(3)

Supreme Court, U.S.
FILED
MAY 13 2004
OFFICE OF THE CLERK

No. 03-1314

IN THE

Supreme Court of the United States

RONALD U. LURIE,

Petitioner,

v.

ROBERT J. BLACKWELL, LIQUIDATING TRUSTEE OF THE POPKIN & STERN LIQUIDATING TRUST,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

JAMES B. DAY
BLACKWELL & ASSOCIATES, P.C.
2678 Babble Creek
P.O. Box 310
O'Fallon, Missouri 63366-0310
(636) 240-3632

Counsel for Respondent

187468

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. Whether petitioner has been deprived of property without due process of law as guaranteed by the Fifth Amendment to the United States Constitution when a Liquidating Trustee in bankruptcy levies against property owned by the petitioner to satisfy a deficiency judgment obtained pursuant to 11 U.S.C. § 723(a) without first determining whether such a deficiency still exists at the time of the levy, when that judgment is based entirely on estimated damages that the Liquidating Trustee has an affirmative obligation to reduce as the allowed claims are reduced?

II. Whether petitioner has been deprived of property without due process of law as guaranteed by the Fifth Amendment to the United States Constitution when a Liquidating Trustee in bankruptcy adds post-judgment interest to a deficiency judgment obtained pursuant to 11 U.S.C. § 723(a) without first determining whether such a deficiency exists at the time the interest was added, when that judgment is based entirely on estimated damages that the Liquidating Trustee has an affirmative obligation to reduce as the allowed claims are reduced?

III. Whether petitioner has been deprived of property without due process of law as guaranteed by the Fifth Amendment to the United States Constitution when a Liquidating Trustee in bankruptcy adds administrative costs and fees to a deficiency judgment obtained pursuant to 11 U.S.C. § 723(a)?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Cited Authorities iii

Statement of the Case 1

Reasons for Denying the Petition 5

I. Lurie's Right To Due Process Has Not Been Violated 5

Conclusion 12

TABLE OF CITED AUTHORITIES

Page

Bankruptcy Appellate Panel

In re Popkin & Stern, 141 F.3d 1169 (8th Cir. BAP 1998) (unpublished) 4

In re Popkin & Stern, 226 B.R. 882 (8th Cir. BAP 1998) 4

In re Popkin & Stern, 234 B.R. 724 (8th Cir. BAP 1999) 4

In re Popkin & Stern, 238 B.R. 146 (8th Cir. BAP 1999) 4

In re Popkin & Stern, 259 B.R. 701 (8th Cir. BAP 2001) 4

In re Popkin & Stern, 263 B.R. 885 (8th Cir. BAP 2001) 4

In re Popkin & Stern, 266 B.R. 146 (8th Cir. BAP 2001) 4

In re Popkin & Stern, 292 B.R. 910 (8th Cir. BAP 2003) 3, 4

Courts of Appeals

Andrulonis v. United States, 26 F.3d 1224 (2d Cir. 1994) 8

Cited Authorities

	Page
Lane v. Peterson, 899 F.2d 737 (8th Cir. 1990)	5
Lurie v. Blackwell, 211 F.3d 1274 (9th Cir. 2000) (unpublished)	4
In re Popkin & Stern, 105 F.3d 1248 (8th Cir. 1997)	4
In re Popkin & Stern, 168 F.3d 494 (8th Cir. 1998) (unpublished)	4
In re Popkin & Stern, 196 F.3d 933 (8th Cir. 1999)	4
In re Popkin & Stern, 233 F.3d 764 (8th Cir. 2000)	4
In re Popkin & Stern, 242 F.3d 376 (8th Cir. 2000) (unpublished)	4
In re Popkin & Stern, 289 F.3d 554 (8th Cir. 2002)	4
In re Popkin & Stern, 47 Fed. Appx. 785 (8th Cir. 2002) (unpublished)	4
In re Popkin & Stern, 85 Fed. Appx. 543 (8th Cir. 2004) (unpublished)	3, 4

Cited Authorities

Page

Pacific Reporter

Blackwell v. Lurie, 943 P.2d 1318 (Mont. 1997) 4

Blackwell v. Lurie, 71 P.3d 509 (N.M. Ct. App. 2003) 4

Blackwell v. Lurie, 43 P.3d 985 (Mont. 2002) (unpublished) 5

Lurie v. Blackwell, 948 P.2d 1161 (Mont. 1997) 4

Lurie v. Blackwell, 51 P.3d 846 (Wyo. 2002) 4

Lurie v. Sheriff of Gallatin County, 949 P.2d 1163 (Mont. 1997) 4

Lurie v. Sheriff of Gallatin County, 999 P.2d 342 (Mont. 2000) 4

Southwest Reporter

8182 Maryland Associates v. Lurie, 949 S.W.2d 150 (Mo. App. 1997) 3

8182 Maryland Associates v. Sheehan, 14 S.W.3d 576 (Mo. App. 2000) 3

Cited Authorities

Page

United States Constitution

Fifth Amendment i

Statutes

11 U.S.C. § 723 7

11 U.S.C. § 723(a) i

28 U.S.C. § 1961 8

STATEMENT OF THE CASE

The Court of Appeals for the Eighth Circuit and the U.S. Bankruptcy Appellate Panel for the Eighth Circuit accurately stated the pertinent, undisputed facts related to Lurie's claim. [Pet'r App. 1-11, Pet'r Supp. App. 1-6]. Briefly, Petitioner Ronald U. Lurie ("Lurie") defaulted on his obligations with the Liquidating Trust for the Popkin & Stern Chapter 11 Bankruptcy Estate. Respondent Robert J. Blackwell, Liquidating Trustee of the Popkin & Stern Liquidating Trust ("Liquidating Trustee") filed an Adversary Complaint against Lurie due to said default. On October 20, 1994, the U.S. Bankruptcy Court for the Eastern District of Missouri entered a judgment against Lurie for the amount of $1,121,743.00 (the "1994 Judgment"). [Pet'r App. 53-63]. Lurie appealed the 1994 Judgment to the U.S. District Court for the Eastern District of Missouri; however, said appeal was dismissed for failure to file a brief. Liquidating Trustee revived said judgment in 1997, 2000, and 2003.

In October 2001, seven years after the 1994 Judgment was entered against him, Lurie sought to collaterally attack said judgment by filing a Motion for Accounting, Adjustment, Statement of Amount Due, Stay and Voiding of Executions with the U.S. Bankruptcy Court for the Eastern District of Missouri. The Bankruptcy Court denied the relief requested by Lurie [Pet'r App. 18- 39] and determined, among other things, that the 1994 Judgment was a final, sum certain judgment [Pet'r App. 32] and found that the amount of the Liquidating Trust deficiency exceeded the outstanding balance remaining under the 1994 Judgment. [Pet'r App. 36]. The U.S. Bankruptcy Appellate Panel for the Eighth Circuit and the Court of Appeals for the Eighth Circuit affirmed the order of the Bankruptcy Court. [Pet'r App. 1-11, Pet'r Supp. App. 1-6].

Lurie misrepresented some of the record facts below. [Pet'r 8-11]. Lurie and his wife executed a deed of trust giving the Liquidating Trust a security interest in their Missouri residence to pay the obligations of the First and Second Participant Settlement Notes that Lurie signed pursuant to his obligations under the Liquidating Trust. [Pet'r App. 60, 81-90]. Liquidating Trustee properly recorded said security interest in the County where the Luries' Missouri residence was situated. [Pet'r App. 60]. Lurie and his wife failed to inform the Trustee that they had a closing for the sale of their Missouri residence, failed to disclose to the buyers and the title company that the Liquidating Trust had said security interest in their Missouri residence or obtain a release of said security interest at the time of closing, and failed to surrender the equity realized from the sale of said real estate to Liquidating Trustee. Lurie misrepresented in testimony before the U.S. Bankruptcy Court for the Eastern District of Missouri what he did with these funds and he later admitted that he used the proceeds from his Missouri residence to purchase real estate in the State of Montana. On September 23, 1994, Lurie was convicted for making a false declaration to the Bankruptcy Court and he was then sentenced to 18 months.

Liquidating Trustee executed on a number of assets owned by Lurie in an effort to satisfy the 1994 Judgment. Liquidating Trustee also obtained judgments against Lurie's wife, Nancy Lurie, under the Uniform Fraudulent Transfer Act to recover the value of certain assets that Lurie transferred to her and to set aside certain other transfers. Liquidating Trustee's execution on the oil painting, *Apache Renegades*, and the various ownership interests in this asset are not relevant to the issues in this appeal. The Court of Appeals for the Eighth Circuit and the U.S. Bankruptcy Appellate

Panel for the Eighth Circuit affirmed the U.S. Bankruptcy Court's order allocating the proceeds realized from the Sheriff's sale of this asset between the Liquidating Trust (which recovered Lurie's interest in said painting under a Writ of Execution) and other members of Lurie's family. *See In re Popkin & Stern*, 292 B.R. 910 (8th Cir. BAP 2003) and *In re Popkin & Stern*, 85 Fed. Appx. 543 (8th Cir. 2004) (unpublished). These decisions were entered after the judgments against Nancy Lurie were satisfied. Lurie's family members have received the amount allocated to their interest in said oil painting as stated in these decisions.

After Lurie defaulted under his obligations to the Liquidating Trust, he was no longer protected from the stay imposed by the confirmed Chapter 11 Plan on the creditors of Popkin & Stern, a partnership. The largest creditor of the debtor, 8182 Maryland Associates ("8182 Maryland"), has a claim in the Bankruptcy Estate for the rent owed by the Debtor; however, this claim is limited by the rejection of lease provisions in the confirmed Plan to the amount of $1,728,512.35. After Lurie's default, 8182 Maryland filed suit against Lurie, as one of the former partners of Popkin & Stern, to recover the entire amount of outstanding rent owed under a commercial lease. 8182 Maryland obtained a judgment against Lurie for $3,574,042.60 together with costs (the "8182 Judgment"). *See 8182 Maryland Associates v. Lurie*, 949 S.W.2d 150 (Mo. App. 1997). Other former partners of Popkin & Stern have also been sued by 8182 Maryland for rent owed under the same commercial lease. *See 8182 Maryland Associates v. Sheehan*, 14 S.W.3d 576 (Mo. App. 2000).

Lurie and his wife each owned a share of the limited partnership interests in 8182 Maryland Associates. 8182 Maryland executed on Lurie's interest in said partnership and applied the $17,197.00 in proceeds realized from the sale of that interest to the outstanding balance owed on the 8182 Judgment.

There has been extensive litigation between Lurie and the Liquidating Trustee in this case. The following is a list of the appellate decisions organized by State. MISSOURI: *In re Popkin & Stern*, 105 F.3d 1248 (8th Cir. 1997); *In re Popkin & Stern*, 141 F.3d 1169 (8th Cir. BAP 1998) (unpublished); *In re Popkin & Stern*, 168 F.3d 494 (8th Cir. 1998) (unpublished); *In re Popkin & Stern*, 226 B.R. 882 (8th Cir. BAP 1998); *In re Popkin & Stern*, 234 B.R. 724 (8th Cir. BAP 1999); *In re Popkin & Stern*, 238 B.R. 146 (8th Cir. BAP 1999); *In re Popkin & Stern*, 196 F.3d 933 (8th Cir. 1999); *In re Popkin & Stern*, 233 F.3d 764 (8th Cir. 2000); *In re Popkin & Stern*, 242 F.3d 376 (8th Cir. 2000) (unpublished); *In re Popkin & Stern*, 259 B.R. 701 (8th Cir. BAP 2001); *In re Popkin & Stern*, 263 B.R. 885 (8th Cir. BAP 2001); *In re Popkin & Stern*, 266 B.R. 146 (8th Cir. BAP 2001); *In re Popkin & Stern*, 289 F.3d 554 (8th Cir. 2002); *In re Popkin & Stern*, 47 Fed. Appx. 785 (8th Cir. 2002) (unpublished); *In re Popkin & Stern*, 292 B.R. 910 (8th Cir. BAP 2003); *In re Popkin & Stern*, 85 Fed. Appx. 543 (8th Cir. 2004) (unpublished). WYOMING: *Lurie v. Blackwell*, 51 P.3d 846 (Wyo. 2002). NEW MEXICO: *Blackwell v. Lurie*, 71 P.3d 509 (N.M. Ct. App. 2003). MONTANA: *Blackwell v. Lurie*, 943 P.2d 1318 (Mont. 1997); *Lurie v. Blackwell*, 948 P.2d 1161 (Mont. 1997); *Lurie v. Sheriff of Gallatin County*, 949 P.2d 1163 (Mont. 1997); *Lurie v. Sheriff of Gallatin County*, 999 P.2d 342 (Mont. 2000); *Lurie v. Blackwell*, 211 F.3d 1274 (9th Cir. 2000) (unpublished);

Blackwell v. Lurie, 43 P.3d 985 (Mont. 2002) (unpublished). However, this is the first Writ of Certiorari filed with the Supreme Court of the United States.

REASONS FOR DENYING THE PETITION

I. LURIE'S RIGHT TO DUE PROCESS HAS NOT BEEN VIOLATED

On September 26, 1994, the U.S. Bankruptcy Court held the trial of Liquidating Trustee's adversary complaint against Lurie. Lurie was represented by counsel; however, Lurie did not appear at trial or testify. Lurie's attorney argued that the issue before the Court was a contract issue. The Court found that Lurie defaulted on his agreements with the Liquidating Trust. Liquidating Trustee offered into evidence an affidavit that used both actual and estimated amounts to calculate the deficiency that existed between the actual and anticipated allowed claims of creditors and the actual and anticipated assets that had been and would be recovered by the Liquidating Trust. [Pet'r App. 54-55]. Lurie's attorney cross-examined the Liquidating Trustee about this affidavit and stipulated to the deficiency calculation. Lurie's attorney did not introduce any contrary evidence, dispute how the deficiency was calculated, or challenge the use of estimates. After the trial was concluded, the Bankruptcy Court entered the 1994 Judgment against Lurie. [Pet'r App. 53-63]. Lurie's appeal of the 1994 Judgment was dismissed for failure to file a brief. The 1994 Judgment is ascertainable, certain, and final. Lurie had his day in court. Res judicata precludes relitigation of a claim that was raised or could have been raised in the prior action. *Lane v. Peterson*, 899 F.2d 737 (8th Cir. 1990). Lurie is barred from litigating issues he should have raised in his initial appeal of the 1994 Judgment now.

On June 17, 2002, the U.S. Bankruptcy Court considered Lurie's Motion for Accounting and other matters. Lurie actively participated at this hearing. [Pet'r App. 20]. The Court considered materials offered and admitted into evidence by Liquidating Trustee at this hearing and determined that the Liquidating Trust deficiency amount as of June 7, 2002 was $977,978.00 [Pet'r App. 36] and the outstanding balance due and owing pursuant to the 1994 Judgment as of June 17, 2002 was $793,294.34. [Pet'r App. 36]. The Liquidating Trust deficiency amount exceeded, and continues to exceed, the outstanding balance due and owing on the 1994 Judgment.

The deficiency amount is the difference between the value of the property of the debtor's estate minus the allowed claims against the Debtor. [Pet'r App. 25]. The Liquidating Trustee settled the legal malpractice claims for an amount less than what the Liquidating Trustee estimated at Lurie's trial in 1994. [Pet'r 15]. The current amount of the Liquidating Trust deficiency reflects this adjustment. The Liquidating Trustee's materials submitted to the Bankruptcy Court at the June 17, 2002, hearing correctly accounted for the settlements of the legal malpractice claims in the deficiency amount. Similarly, the 1994 Judgment also contained Liquidating Trustee's estimate of what additional administrative fees and expenses he thought would arise during the administration of the Popkin & Stern Chapter 11 case. [Pet'r App. 54]. Due to the extensive litigation initiated by Lurie and his family, this estimate was extremely low. Once again, the amount of the Liquidating Trust deficiency determined by the Bankruptcy Court at the June 17, 2002 hearing reflected the actual administrative expenses, as well as Liquidating Trustee's estimate of the additional administrative expenses he anticipated the Liquidating Trust

would incur in this case. Until the administration of the Popkin & Stern case is concluded, Liquidating Trustee cannot determine whether "the amount of the deficiency is *ultimately* determined to be less than the amount of this judgment" as required by the 1994 Judgment. [Pet'r App. 53]. The 1994 Judgment and the confirmed Plan do not require the Liquidating Trustee to continually calculate the deficiency amount. Lurie has not been deprived of any property in violation of due process.

Popkin & Stern is an active Chapter 11 Bankruptcy Case. The adversary complaint filed by the Liquidating Trustee against Lurie was not brought under 11 U.S.C. § 723 alone. Instead, the Confirmed Second Amended Plan states that in the event of a default, the Liquidating Trustee had standing to assert a claim for relief against the Defaulting Partner under the Plan *and* 11 U.S.C. § 723 to seek payment for any deficiency. [Pet'r App. 62]. Lurie executed the Participant Settlement Agreement which stated that he consented to all the terms and conditions of the Plan. [Pet'r App. 82]. 11 U.S.C. § 723 is not applicable to Chapter 11 Bankruptcy Cases. This section is made applicable in the Popkin & Stern Chapter 11 case by virtue of the confirmed Plan that allows the filing of an action under 11 U.S.C. § 723 when a partner, such as Lurie, defaults on his obligations under said Plan and his Participant Settlement Agreements. [Pet' App. 62]. Lurie seeks to mislead this Court by contending he was denied due process rights when the lower courts did not follow what he contends to be the plain language of 11 U.S.C. § 723 and its legislative history. [Pet'r 12 and 22]. Lurie's incorrectly alleges that the "only basis" for the Liquidating Trustee's action is under 11 U.S.C. § 723.

Under 28 U.S.C. § 1961, "interest shall be allowed on any money judgment in a civil case recovered in a district court". The 1994 Judgment is final and Lurie is barred from collaterally attacking this judgment now. The U.S. Bankruptcy Appellate Panel for the Eighth Circuit and the Court of Appeals for the Eighth Circuit affirmed the Bankruptcy Court's finding that the 1994 Judgment bore interest from October 20, 1994, the date of the judgment. [Pet'r App. 10, Pet'r Supp. App. 4]. The text of the 1994 Judgment clearly states the amount of the judgment. This amount is easily ascertainable and is not based on any contingencies. [Pet'r App. 53]. Thus, interest properly accrues on the 1994 Judgment entered against Lurie. There is nothing complicated about this issue.

There is no split in authority between the Second and Eighth Circuit, as Lurie tries to suggest. The facts in *Andrulonis v. United States*, 26 F.3d 1224 (2d Cir. 1994) involve third party contribution. By contrast, Lurie defaulted on his obligations to the Liquidating Trust and the Bankruptcy Court entered the 1994 Judgment against him for the Liquidating Trust deficiency amount. The 1994 Judgment requires the Liquidating Trustee to move to reduce the judgment only if the amount of the deficiency is "ultimately" determined to be less than the amount of the judgment. [Pet'r App. 53-54]. When all claims, including administrative expenses, are paid in full, continued execution on Lurie's assets would be unnecessary even if a balance remained on the 1994 Judgment. Under this circumstance, the Liquidating Trustee would be obligated under the 1994 Judgment to move to reduce said judgment. If the Liquidating Trustee recovers funds from another defaulting partner, the claims in the bankruptcy estate will be reduced by the amount collected. No event needs to occur before the Liquidating Trust

deficiency amount can be determined. The Bankruptcy Court determined the deficiency amount during the trial against Lurie that resulted in the 1994 Judgment and again at the June 17, 2002 hearing on Lurie's Motions for Accounting and other matters. There is no conflict between the Circuits for this Court to resolve.

8182 Maryland is not barred by an election of remedies to pursue a claim in the Popkin & Stern bankruptcy case and recover the balance owed on the 8182 Judgment from Lurie. 8182 Maryland has a claim in the bankruptcy case for rent owed by the Popkin & Stern partnership under a commercial lease; however, this claim was limited to the amount of $1,728,512.35 by the lease rejection provisions under the confirmed Plan and the Bankruptcy Code. When a partner of Popkin& Stern went into default, such as Lurie, the confirmed Plan provided that the injunction against 8182 Maryland was lifted and the creditor was no longer stayed from pursuing that defaulting partner for the entire amount owed under the commercial lease. 8182 Maryland obtained the 8182 Judgment against Lurie for the amount of $3,574,042.60.

8182 Maryland applies any funds that it receives as a disbursement from the Liquidating Trust to the balance owed on the Popkin & Stern commercial lease. Liquidating Trustee introduced as evidence at the June 17, 2002 hearing an affidavit from an accountant that reviewed the records of 8182 Maryland. This affidavit stated that outside of the distributions from the Liquidating Trust, 8182 Maryland recovered approximately $43,000.00 from former partners of Popkin & Stern. This includes the $17,197.00 recovered from an execution on Lurie's interest in 8182 Maryland. Nothing in the record suggests that 8182 Maryland has attempted to collect twice for the same injury. Election of remedies is not applicable here.

Lurie attempts to raise issues about the *Rooker-Feldman* Doctrine which has nothing to do with the issues in this appeal. [Pet'r. 16-17]. On July 19, 2002, the U.S. Bankruptcy Court entered its Findings of Fact and Conclusions of Law regarding Lurie's pending Motions which included his Motion for Accounting and other matters. [Pet'r App. 18-39]. In this appeal, neither the U.S. Bankruptcy Appellate Panel for the Eighth Circuit nor the Court of Appeals for the Eighth Circuit used the *Rooker-Feldman* Doctrine to analyze the 8182 Judgment or the finality of the 1994 Judgment. [Pet'r App. 1-11, Pet'r Supp. App. 1-6]. The decisions discussing the *Rooker-Feldman* Doctrine contained in Lurie's appendix [Pet'r App. 12-17, App. 40-52, and App. 64-75] pertain to several appeals arising out of an Adversary Complaint that the Liquidating Trustee filed against Lurie's wife. These appeals have either been dismissed [Pet'r App. 13 and 17] or the issues were resolved on remand. Lurie's contention that the lower courts misinterpreted the *Rooker-Feldman* Doctrine is not proper for review during this appeal.

Finally, Lurie contends that he has been deprived of property without due process because the lower courts increased the 1994 Judgment by approximately $27,000.00 for the administrative costs and fees incurred by the Liquidating Trustee to respond to Lurie's motions. [Pet'r 20-21]. Lurie incorrectly interprets these decisions. The 1994 Judgment is final, a sum certain, and unalterable. Liquidating Trustee obtained approval, and continues to obtain approval, from the Bankruptcy Court of every application for administrative fees and expenses. This includes administrative fees and expenses assessed against Lurie in the Order denying the relief requested in Lurie's Motion for Accounting and other matters. [Pet'r App. 39]. Substantial administrative fees and expenses were incurred to comply with the information requested in Lurie's various motions and to

submit the information in the format required by the Bankruptcy Court. Creditors did not benefit from Lurie's motions and the Liquidating Trust deficiency amount increased due to these additional administrative expenses. Liquidating Trustee requested that Lurie be responsible for these fees; otherwise, creditors would have to bear the cost to pay administrative expenses. The Bankruptcy Court was within its discretion to order Lurie to pay the Liquidating Trustee $14,224.50 for the reasonable costs of the accounting and supplemental accounting and $12,955.00 for the reasonable attorneys fees to defend Lurie's meritless motions. [Pet'r App. 39]. The Court of Appeals for the Eighth Circuit properly affirmed the Bankruptcy Court's decision assessing said administrative costs against Lurie. [Pet'r Supp. App. 5].

Lurie was present and actively participated at the June 17, 2002 hearing on his various motions. [Pet'r App. 20]. Despite what Lurie attempts to argue, he was not deprived of due process of law. He is merely trying to collaterally attack the 1994 Judgment years after it became final.

CONCLUSION

The lower courts appropriately ruled on the matter raised by Lurie in his various motions and the issues raised in Lurie's appeals. Lurie's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JAMES B. DAY
BLACKWELL & ASSOCIATES, P.C.
2678 Babble Creek
P.O. Box 310
O'Fallon, Missouri 63366-0310
(636) 240-3632

Counsel for Respondent